Supreme Court, U.S.
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No.——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

U.S. ANCHOR MFG., INC.
Petitioner,

v.

RULE INDUSTRIES, INC.,
TIE DOWN, INC.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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140 pp

QUESTIONS PRESENTED

1. In an attempted monopolization case under Sherman Act section 2, does a determination that the defendant did not have a 50% or greater share of the relevant market — based upon an improper redefinition of the relevant market — preclude as a matter of law a finding of dangerous probability of monopolization, without regard to evidence that the relevant market was highly concentrated, that there were significant barriers to entry, that the defendant had the capacity to cross-subsidize predation from a closely-related product market which it controlled, and that eliminating the plaintiff as a competitor would leave the defendant with 78-89% or more of the relevant market?

2. Does establishing the existence of an illegal predatory price-fixing agreement under Sherman Act section 1 require establishing under a heightened standard of proof that in addition to agreeing on prices both parties had affirmative knowledge and a specific predatory intent that the agreed prices be at below-cost levels?

LIST OF PARTIES

The parties to the proceeding below were petitioner, U.S. Anchor Mfg., Inc.; counterclaim-defendant William Chapman, president of U.S. Anchor, who is not a petitioner here; and respondents, Rule Industries, Inc. and Tie Down, Inc.

Pursuant to Supreme Court Rule 29.1, the Court is advised that the petitioner does not have any parent companies or any subsidiaries that are not wholly-owned.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 7 F.3d 986 (11th Cir. 1993) and is reprinted in the Appendix to this Petition ("Pet. App.") at 1a. The order of the United States District Court for the Northern District of Georgia denying respondents' motions for summary judgment is reported at 717 F. Supp. 1565, and is reproduced at Pet. App. 48a. The opinion of the United States District Court for the Northern District of Georgia denying motions for judgment notwithstanding the verdict and ruling on other motions, dated September 4, 1991, is not reported and is reproduced at Pet. App. 74a. The Order of the United States Court of Appeals for the Eleventh Circuit denying rehearing, dated January 7, 1994, is not reported and is reproduced at Pet. App. 100a.

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was issued on November 23, 1993. An order denying petitioner's timely petition for rehearing was entered on January 7, 1994. On March 11, 1994, Associate Justice Anthony M. Kennedy signed an order extending the time for filing this petition to and including May 6, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

15 U.S.C. § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine

not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

This petition follows the Eleventh Circuit's reversal of a jury verdict for petitioner U.S. Anchor Mfg., Inc. ("U.S. Anchor") on Sherman Act section 2 attempted monopolization and section 1 and 2 conspiracy claims arising from respondents' anticompetitive scheme to dominate the recreational boat anchor market. The jury found that respondents had conspired to fix prices for their anchors at predatory levels and to monopolize, and that respondent Rule Industries, Inc. ("Rule") had individually engaged in predatory pricing, in order to drive U.S. Anchor out of the market, which would have left respondents with a 78-89% or greater market share. In reversing that verdict, the Eleventh Circuit held as a matter of law that, without regard to other market conditions, there could be no dangerous probability of success by an attempted monopolist unless it already had at least fifty percent of the market. The court of appeals also held as a matter of law that a "heightened standard" should be applied to the conspiracy claims, under which no conspiracy to fix prices could be shown unless *both* parties were aware that the prices, even though agreed upon, were set below cost.

This case involves the two sources of supply which together account for 78-89% or more of the domestic market for "fluke" style recreational boat anchors. Anchors and similar marine products are typically sold by suppliers to wholesale distributors, who in turn sell to smaller boat shops, marinas, and other retail dealers, who sell the products to consumer boat owners. Pet. App. 5a-6a. Within the general category of fluke anchors, there are four

product groups: (1) expensive premium anchors, (2) the well-known "Danforth Standard" brand of anchors, (3) functionally interchangeable "generic" versions of the Danforth Standard, and (4) inexpensive economy anchors used in lake boating. Pet. App. 6a and 22a.

Respondent Rule is a diversified company headquartered in Massachusetts, which sells an assortment of hardware, automotive, and marine supplies. Pet. App. 6a. Respondent Tie Down, Inc. ("Tie Down") is a smaller Georgia company that in the 1970's entered the market as a manufacturer of generic and economy fluke anchors sold under the brand name "Hooker." *Id.* The parties' financial statements submitted at trial show Rule's and Tie Down's combined total sales for their 1987 fiscal years were $46,33-9,000, as compared to $993,000 for U.S. Anchor. Rule first entered the fluke anchor market in 1983, when it acquired the rights to market the Danforth brand.[1]

In 1985, Rule entered into a combination with Tie Down, by which Rule obtained the Hooker trademark and certain related assets and inventory from Tie Down, along with exclusive rights to Tie Down's line of anchors. As part of this agreement, Tie Down agreed to begin manufacturing Danforth anchors for Rule. The agreement also contained a covenant under which Tie Down would not compete with Rule.[2] Since 1985, Tie Down's role in the anchor market has been as a manufacturer for Rule. *See* Pet App. 6a-7a. Prior to their agreement, Rule and Tie Down were the only

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[1] From 1983 to 1985, Rule had the Danforth anchors manufactured for it by the Jacquith Company of New York. Pet. App. 6a.

[2] As a horizontal agreement between then-competitors by which one of them exited the anchor market in favor of the other, the 1985 agreement between Rule and Tie Down bears a strong resemblance to the agreement that was summarily condemned as a section 1 violation by the Court in *Palmer* v. *BRG of Georgia, Inc.*, 498 U.S. 46 (1990).

U.S. manufacturers of boat anchors doing business on a national basis, and together accounted for 90.5% of the dollar volume of boat anchor sales in the selling season immediately prior to the season for which they first undertook combined operations. Pet. App. 84a and 102a.

After Rule and Tie Down entered their new relationship, Tie Down's former president, William Chapman, formed U.S. Anchor as a competing anchor supplier. U.S. Anchor began manufacturing and distributing anchors under the "Sentinel" brand name starting with the 1985-86 marine supplies selling season, which was also the first full selling season for the combined Rule/Tie Down operation. Pet. App. 7a. Following U.S. Anchor's publication of its first price list in August 1985, Rule published prices in September that were 11 to 18 percent higher than U.S. Anchor's. After U.S. Anchor received substantial orders from Rule customers, however, Rule dropped its prices in October by 20%, cutting its prices 6 to 12 percent below U.S. Anchor's. U.S. Anchor then matched Rule's lower prices. *Id.*

At this point, Tie Down's president, Charles MacKarvich, sent a written report to Rule proposing that Rule set new prices levels that would force U.S. Anchor to incur losses. *See* Pet. App. 7a-8a and 103a. MacKarvich estimated U.S. Anchor's costs of production and hypothetical projected sales for a twelve-month period. He concluded that if Rule would agree to further price cuts and extend more generous credit terms to its customers that U.S. Anchor could not match, then U.S. Anchor would be forced to make even greater price concessions. *Id.* Based on these projections, MacKarvich predicted that these lower prices would force U.S. Anchor to incur negative cash flow and a net loss for 1985-86. *Id.* Rule set its prices at the levels proposed in MacKarvich's report in November 1985. *Id.* Tie Down cemented its commitment to Rule's predatory pricing by reducing the price of the anchors it supplied to Rule. Pet. App. 105a.

U.S. Anchor filed suit against Rule and Tie Down in November 1986. The complaint alleged that Rule had attempted to monopolize the fluke anchor market in violation of section 2 of the Sherman Act beginning in October 1985 by predatory pricing. The suit further alleged that Rule and Tie Down had conspired to restrain trade in violation of section 1 of the Sherman Act and conspired to attain and retain a monopoly in violation of section 2 by agreeing to charge predatory prices, also beginning in October 1985.[3] Pet. App. 10a-11a.

The district court denied cross-motions for summary judgment, and the case was tried to a jury. After a trial lasting seven weeks, the jury found Rule liable for attempted monopolization, and found Rule and Tie Down jointly liable for conspiracy in restraint of trade and conspiracy to monopolize. The jury set damages on each of the three claims at $1,638,028, which the court trebled to $4,914,084. The district court denied Tie Down's and Rule's motions for judgment notwithstanding the verdict and for a new trial on damages issues. Rule and Tie Down appealed.[4] Pet. App. 12a.

On appeal, Rule and Tie Down raised numerous objections to the conclusions reached by the jury. Notably absent was any contention that the jury had been improperly instructed on the law. Rule and Tie Down instead challenged the sufficiency of the evidence to support several aspects of the jury's verdict. Relevant here are their conten-

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[3] U.S. Anchor also alleged that Rule had engaged in an illegal tying arrangement involving its new, patented, "Deepset" anchors, and that Rule and Tie Down had violated Georgia law against conspiracies to restrain trade. These claims are not relevant to this petition.

[4] U.S. Anchor cross-appealed from the district court's dismissal of its state law claims, resulting in a certification of state law questions by the Eleventh Circuit to the Georgia Supreme Court that is not relevant to this petition. *See* Pet. App. at 38a *et seq.*

tions that (1) there was insufficient evidence to support the finding of a dangerous probability of success on the attempted monopolization claim, and (2) there was insufficient evidence of conspiracy to support U.S. Anchor's section 1 and section 2 conspiracy claims.

The Eleventh Circuit first addressed the jury's finding of attempted monopolization. Rule sought reversal based on its view of the evidence (a) on barriers to entry into the relevant market, and (b) relating to U.S. Anchor's purported performance. Pet. App. 13a-14a. The court of appeals, however, undertook an extensive analysis of the appropriate definition of the relevant market, even though Rule had not argued the point. Pet. App. 18a. The major questions the court addressed were whether Danforth Standard anchors should be included in the relevant market and whether market share should be measured in dollars as opposed to units. If the jury credited — which apparently it did — the evidence that supported including Danforth Standard anchors in the market and measuring the market in dollars, it would have found that Rule had well over half of the relevant market. The court of appeals held as a matter of law, however, that market share must be measured in units, and that no reasonable jury could have included Danforth Standards in the relevant market, even though the court of appeals acknowledged that those anchors were "functionally interchangeable" with the other anchors in the market, and that an increase in the spread between the prices of the higher-priced Danforth Standards and their equivalents led to decreased sales of the Danforths. Pet. App. 20a *et seq.*

The Eleventh Circuit redefined the market in this way notwithstanding settled law that market definition is an issue of fact for the jury. Even more important for this Court's review of the court of appeals' reversal of the jury's ultimate verdict is the undisputed fact that under *any* definition of the relevant market, it was essentially a duopoly. As revealed in a chart showing various measures of market share introduced by respondent Rule, the combined market share of

U.S. Anchor and Rule/Tie Down during 1985/86 was between 67.6% and 84.6%. Pet. App. 106a. The average combined market share of U.S. Anchor and Rule/Tie Down between 1985 and 1990 was between 78% and 88.6%. *Id.*

Moreover, the district court found that U.S. Anchor had submitted evidence showing that Rule had a 90% market share prior to the first selling season in which U.S. Anchor was a market participant.[5] Pet. App. 84a and 102a. The District Court also expressly found that: "there was evidence before the jury that Rule had the power to achieve a monopoly position in the market"; that there was "ample evidence in the record to support the jury's implicit finding that entry barriers exist in the generic anchor market"; that "ample evidence was presented to the jury from which it could find that Rule possessed the power to engage in predatory pricing"; that "ample evidence exists for the jury to define the relevant market and to determine the defendant's market share therein"; and that the evidence showed that Rule priced below its average variable cost. Pet. App. 82a, 83a, 84a, 85a, and 85a-86a.

The Eleventh Circuit expressly or tacitly acknowledged the existence of issues of fact bearing on these critical findings, including whether respondents' sales were below the appropriate measure of costs, Pet. App. 13a and 34a-35a; the presence of barriers to entry into the market, Pet. App. 13a; the significance of competitive advantages conveyed to Rule by the depth of its product line, Pet. App. 33a, including the ability of Rule to charge prices significantly above competitive levels for its Danforth line, Pet. App. 8a, 23a, 26a and 27a; and the highly concentrated nature of the industry, in which customers had few sources

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[5] By contrast, the court of appeals concluded that it was "undisputed" that Rule and Tie Down had a combined share of only 61.5% prior to the entry of U.S. Anchor — but cited in support only the *defendants'* evidence! Pet. App. 32a-33a.

of supply, Pet. App. 33a. The court of appeals did not, however, address the merits of any of these issues, which thus must be taken as having been decided by the jury in favor of U.S. Anchor.

Having determined what market definition it would apply, the court of appeals reversed the jury's verdict on the attempted monopolization claim. The Eleventh Circuit held as a matter of law that U.S. Anchor could not show the requisite "dangerous probability" of the defendants' acquiring a monopoly. The sole basis cited by the court of appeals for this holding was that Rule/Tie Down did not possess 50% of the relevant market during the relevant time period. Pet. App. 34a. The court held that absent a showing that respondents held at least a 50% market share, U.S. Anchor's verdict could not stand "as a matter of law." *Id.*

Turning to the jury's two conspiracy verdicts against Rule and Tie Down under both Sherman Act sections 1 and 2, the court of appeals again reversed. While acknowledging both the evidence of pricing by Rule in accordance with Tie Down's MacKarvich report as described above, and Rule's intent to achieve an unlawful objective by predatory means, Pet. App. 36a, the court of appeals held that a "heightened standard of proof" must be applied to the conspiracy claims, sufficient to "exclude the possibility that defendants acted independently *or legitimately*." *Id.* (emphasis added).

The Eleventh Circuit held that the MacKarvich report did not necessarily show that Tie Down intended that the agreed prices be predatory, only that they be set low enough to cause U.S. Anchor to suffer losses. Pet. App. 37a. The court also stated that Tie Down had no knowledge of Rule's costs other than the price it paid Tie Down for anchors. *Id.* On this basis, despite accepting that prices were set by Rule in accordance with Tie Down's plan and were in fact predatory, and that Rule intended predation, and notwithstanding that Rule and Tie Down were obviously participating in an ongoing combination by virtue of their 1985

contract, the court of appeals held that there was no conspiracy to restrain trade because there was insufficient evidence to show that Tie Down intended that the agreed prices be at levels below Rule's costs.[6] Pet. App. 38a.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals represents a substantial departure from existing law on both the standards for attempted monopolization and the *per se* illegality of vertical price fixing agreements. The Court should grant certiorari in order to: (1) provide essential guidance on the proper evaluation of the "dangerous probability of success" element in section 2 attempted monopolization cases in light of the conflict between the Eleventh Circuit's rigid 50% market share requirement and the approach of other courts of appeals; and (2) correct the Eleventh Circuit's manifestly incorrect analysis on the conspiracy verdict, which threatens to undermine the Court's long-established rule that price-fixing agreements, whether horizontal or vertical, are *per se* illegal. Without guidance from the Court, the court of appeals' erroneous reasoning will raise unduly high thresholds to meritorious antitrust claims, whether in private antitrust actions or government enforcement efforts.

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[6] In fact, the record plainly showed that Tie Down proposed selling prices to Rule that were *below* the prices that Rule paid to Tie Down for the anchors (plus shipping and labelling charges) in the first place. *See* discussion at pp. 19-20 *infra*. The court of appeals simply refused to acknowledge this evidence, and made no mention of it in its opinion.

I. THE COURT SHOULD GRANT CERTIORARI TO REVIEW THE COURT OF APPEALS' IMPOSITION OF A 50% MARKET SHARE REQUIREMENT FOR SECTION 2 ATTEMPTED MONOPOLIZATION CLAIMS

Recent cases from this Court, most notably *Eastman Kodak Co.* v. *Image Technical Services*, 112 S. Ct. 2072 (1992), teach that antitrust analysis must not rely upon economic theory to the exclusion of actual market facts. Here the Eleventh Circuit applied a 50% market share requirement so rigid that it resulted in reversal of the jury's verdict for U.S. Anchor without regard to *any* other fact — and notwithstanding extensive record evidence of a number of facts bearing on the existence of market power. This approach conflicts with the broader, less formalistic and more realistic analysis that has been employed by other courts of appeals, requiring this Court's attention.

A. The Eleventh Circuit Held That Attempted Monopolization Cannot Be Established as a Matter of Law Unless the Defendant Has a Market Share of at Least 50%

The court of appeals properly recognized that the "three essential elements of a claim of attempted monopolization under section 2 of the Sherman Act" are (1) a specific intent to achieve monopoly power, (2) anticompetitive conduct, and (3) a dangerous probability of successful monopolization. Pet. App. 16a, *citing Spectrum Sports, Inc.* v. *McQuillan*, 113 S. Ct. 884 (1993). The Eleventh Circuit reversed the jury's finding of attempted monopolization by focusing on the third element, but did so by imposing a bright-line requirement that the defendant possess at least 50% of the relevant market at the beginning of its predatory conduct:

> Accordingly, because Rule possessed less than 50% of the market at the time the alleged pre-

> dation began and throughout the time when it was alleged to have continued, there was no dangerous probability of success in October 1985 as a matter of law.

Pet. App. 34a.

In the introductory portion of its attempted monopolization analysis, the court of appeals noted precedent from the Eleventh Circuit stating that "several factors may be relevant to whether a particular market share evinces a dangerous probability of success." Pet. App. 30a (*citing McGahee* v. *Northern Propane Gas Co.*, 858 F.2d 1487, 1505 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989)). Those other factors — the potential for "entry by new firms," the "number and size of alleged victims," and the like, Pet. App. 17a and 30a — were all factors for which the court acknowledged the existence of record evidence but which it declined to address. These factors must accordingly be taken as having been assessed by the jury in U.S. Anchor's favor. Moreover, the district court expressly found, in denying Rule's motion for judgment notwithstanding the verdict, that "[w]hile market share is a good indicator of ability to engage in predatory pricing . . ., market share is not the only indicator of a business' ability to predatorily price." Pet. App. 83a. Nonetheless, the court of appeals' analysis was limited solely to a discussion of defendant Rule's market share. Pet. App. 34a.

Nothing in *Spectrum Sports* or the authorities that decision relies on requires such a rule, and the failure of the Eleventh Circuit's analysis to account for relevant market facts is evident from its application here of its 50% market share test. The record presented at trial contained extensive evidence from which the jury — whose instructions were not challenged on appeal — could have found a dangerous probability of successful monopolization. Under the court of appeals' own market definition analysis, for example, it found that Rule held a monopoly over a separate market for

Danforth anchors, and could consistently sell Danforths at very high prices to a loyal customer base, which valued its "mystique." Pet. App. 26a-27a. Yet notwithstanding the jury's verdict for U.S. Anchor, the court of appeals ignored the obvious ability this gave Rule to cross-subsidize predatory prices on its non-Danforth anchors.

Equally important, the court of appeals excluded from its assessment of the dangerous probability of monopolization the critical fact that even the defendants' evidence showed that U.S. Anchor and Rule/Tie Down together accounted, on average, for at least *78% to 88%* of the relevant market, Pet. App. 106a, and that there was evidence from which the jury could have concluded that there were significant barriers to entry into the relevant market. Indeed, the court of appeals acknowledged that "the anchor industry was highly concentrated and customers had few alternative sources of supply . . . ." Pet. App. 33a. Such a situation, in which the predator and its victim together dominate a duopoly market, presents a market reality for which the Eleventh Circuit's rigid 50% requirement cannot account.

Nowhere does the court of appeals explain why a bright-line market share test should be applied retroactively to purported shares at the beginning of the predatory conduct, without any effort to project the likely market share consequences should the predatory scheme prove successful. If the predator firm, even if holding less than 50% of the market, succeeds in driving its competitor from such a highly concentrated market in the manner outlined in the MacKarvich memo, the predator will perforce be left as a monopolist. *Cf. Lorain Journal Co.* v. *United States*, 342 U.S. 143, 150 (1951) (finding that defendant had violated § 2 where "[a]ttainment of that sought-for elimination [of a radio station rival for advertising] would automatically restore to the publisher of the [defendant newspaper] its substantial monopoly in [the relevant market] of the mass dissemination of all news and advertising, interstate and national, as well as local.").

In short, there was record evidence before the jury on a number of factors that supported its finding of a dangerous probability of success. Those included factors that the court of appeals declined to address on the merits, and thus was required to assume in U.S. Anchor's favor. The exclusion of the other factual and economic considerations from the analysis establishes the unprecedented rigidity of the 50% requirement that the court of appeals seeks to impose.

B. Other Courts of Appeals Have Required a Realistic Assessment of *All* Relevant Facts In Determining Whether There is a Dangerous Probability of Monopolization

The Eleventh Circuit's analysis is squarely at odds with decisions from several other courts of appeals. Instead of limiting their analysis to a numerical evaluation of the defendant's historic market share, other courts properly consider the range of factors that can indicate a dangerous probability that a defendant will succeed in monopolizing a market. Numerous cases illustrate the appropriate, fact-based approach, providing a stark contrast to the Eleventh Circuit's analysis here.

For example, in *Domed Stadium Hotel* v. *Holiday Inns*, 732 F.2d 480, 490 (5th Cir. 1984), the court recognized that "a [market] share of less than the fifty percent generally required for actual monopolization may support a claim for attempted monopolization if other factors such as concentration of market, high barriers to entry, consumer demand, strength of the competition, or consolidation trend in the market are present." Similarly, the Second Circuit stated in *International Distribution Centers, Inc.* v. *Walsh Trucking Co.*, 812 F.2d 786, 792 (2d Cir. 1987) that

> market share analysis, while essential, is not necessarily determinative in the calculation of monopoly power under this standard. Other

> market characteristics must also be considered in determining whether a given firm has monopoly power or has a dangerous probability of acquiring monopoly power. . . . Among these characteristics are the strength of the competition, the probable development of the industry, the barriers to entry, the nature of the anticompetitive conduct and the elasticity of consumer demand.

See also Kelco Disposal v. *Browning-Ferris Indus.*, 845 F.2d 404 (2d. Cir. 1988), *aff'd on other grounds*, 492 U.S. 257 (1989) (recognizing the factors listed in *Walsh Trucking*).

Other cases further illustrate the clash between the Eleventh Circuit's approach and that traditionally taken by other courts. *See, e.g., Shoppin' Bag of Pueblo, Inc.* v. *Dillon Cos.*, 783 F.2d 159, 162 (10th Cir. 1986) (requiring "assessment based on as much information as is available" on factors such as the "number and strength of the defendant's competitors, the difficulty or ease of entry into the market by new competitors, consumer sensitivity to change in prices, innovations or developments in the market, whether the defendant is a multimarket firm, as well as other evidence"); *White & White, Inc.* v. *American Hospital Supply Corp.*, 723 F.2d 495, 507 (6th Cir. 1983) (determination of market power "mandates a comparison of the defendant's size, performance and policies to that of other competitors *and* an analysis of the market structure.").

Professors Areeda and Turner, in their seminal treatise, make clear that the dangerous probability element "does not require significant pre-existing market power, but only that the defendant's market position, when coupled with the challenged conduct, may result in monopoly." 3 P. Areeda and D. Turner, *Antitrust Law* ¶ 835a at 346 (1978). In reviewing the types of conduct that would justify application of section 2's attempt clause, Professors Areeda and Turner directly address the conduct at issue here:

> Predatory pricing is a particularly good example [of conduct that would satisfy the above test], for such pricing is itself proof that the firm, if not already possessing a degree of market power, anticipates obtaining it. Otherwise it would not be able to recoup its losses by monopoly profits earned after the target firms are extinguished.

Id. ¶ 836b at 353. This reasoning is particularly cogent here, since the Eleventh Circuit made no finding that the evidence of below cost sales was in any way insufficient.

Likewise, the ABA Antitrust Section's compilation and summary of antitrust case law states that in attempted monopolization cases,

> [a]s in the monopolization context, however, market shares do not tell the entire story. Other relevant factors include the strength and capacity of existing and potential competition, barriers to entry, the concentration of the market, the trend toward greater or lesser concentration, the nature of the defendant's anticompetitive conduct, and the elasticity of consumer demand. Thus, market shares not reaching the level required for actual monopolization may support a claim for attempted monopolization if an evaluation of these or other market characteristics demonstrates that a dangerous probability of monopolization exists.

ABA Antitrust Section, *Antitrust Law Developments* 265-66 (3d ed. 1992).

The teaching of these cases and authorities is that in the real world of commerce, determining whether there is a dangerous probability of monopolization requires meaningful

analysis of a range of relevant factors, not just market shares. None of those additional factors was examined by the Eleventh Circuit. Indeed, its 50% market share threshold for finding dangerous probability of successful monopolization is a level that other courts have recognized as potentially sufficient to establish *actual monopolization*. *See, e.g., Broadway Delivery Corp.* v. *United Parcel Service of America, Inc.*, 651 F.2d 122, 130 (2d Cir.), *cert. denied*, 454 U.S. 968 (1981) (trial court's jury instruction precluding a finding of monopoly power if the defendant's market share was less than 50% legally erroneous); *see also Kearney & Trecker Corp.* v. *Giddings & Lewis, Inc.*, 452 F.2d 579, 598 (7th Cir. 1971) (Stevens, J.) (firm with 30% of market "clearly" was able "to make a serious attempt to acquire monopoly status").

The Eleventh Circuit's 50% market share test elevates a relevant fact to an ultimate conclusion, to the exclusion of factors that other circuits have properly recognized may show a dangerous probability of attempted monopolization, and without adequately recognizing that the "ultimate concern is the firm's actual or threatened impact on competition in the relevant market." *Kearney & Trecker Corp.*, 452 F.2d at 598.

C. This Case Provides a Particularly Good Vehicle for the Court to Provide Needed Guidance on the Proper Evaluation of the Dangerous Probability of Monopolization

Because the court of appeals acknowledged other relevant factors but excluded them from its analysis, the question of the propriety of a 50% market share requirement is cleanly presented. The court of appeals reversed the verdict of a properly instructed jury on this basis by excluding from its consideration evidence on barriers to entry, the existence of a duopoly market in which the defendant could cross-subsidize predation from the profits of its other product lines, and the like. Unlike cases from other courts, which

consider market share along with numerous other factors, the Eleventh Circuit's decision thus isolates the market share issue and provides a particularly good opportunity for the Court to provide guidance on the role of market share in section 2 attempted monopolization claims.

There can be little doubt that the jurisprudence of antitrust has, over the last decade or so, benefitted greatly from an injection of increasingly sophisticated economic analysis. But the alluring tidiness of economic theory should not distract courts from the complexities and imperfections of markets, nor from the facts in the cases before them. As the Court warned in the *Kodak* case, "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law." 112 S. Ct. at 2082. The elevation of legal presumptions over market realities is exactly what happened here, and why the Court should grant certiorari. Having established in *Spectrum Sports* that "dangerous probability of success" is an essential element of an attempted monopolization claim, the court should now provide guidance on the application of this element. Without such guidance, the Eleventh Circuit's decision threatens to undermine the effectiveness of section 2 of the Sherman Act in policing anticompetitive conduct.

II. THE ELEVENTH CIRCUIT'S REVERSAL OF THE JURY'S SECTION ONE CONSPIRACY VERDICT WAS A MANIFEST AND FUNDAMENTAL ERROR WARRANTING SUPERVISION FROM THE COURT

The Eleventh Circuit's reversal of the jury's verdict on the conspiracy claims, which were brought under both section 1 and section 2 of the Sherman Act, is based on an egregious and fundamental flaw. There is clear record evidence — indeed documentary proof recognized by the court of appeals — that Rule and Tie Down agreed to set prices on the basis of the MacKarvich memo. Pet. App. 8a. The court of appeals further assumed for purposes of its

analysis that the price levels agreed to were predatory. Pet. App. 36a. Nonetheless, the court, adopting a "heightened standard" of scrutiny, held that no violation had occurred because Tie Down did not know the prices set were predatory. Pet. App. 36a and 38a.

This holding completely disregards the fundamental rule that *all* agreements to set price are *per se* illegal, without regard to what the parties know or believe about the appropriateness of the price level selected. Prices "are fixed because they are agreed upon." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 222-23 (1940). Few things are more well-established in antitrust law than the principle that: "Proof that a combination was formed for the purpose of fixing prices and that it caused them to be fixed or contributed to that result is proof of the completion of a price-fixing conspiracy under § 1 of the [Sherman] Act." *Id.* at 224.

The court of appeals was willing to acknowledge that the prices resulting from the agreement were anticompetitive, but effectively ignored this Court's holdings on several occasions that, in a civil action under section 1 "liability may be established by proof of *either* an unlawful purpose or an anticompetitive effect." *E.g., McLain* v. *Real Estate Board of New Orleans*, 444 U.S. 232, 243 (1980); *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 444 (1978). The Eleventh Circuit's injection of intent as a prerequisite to finding a price-fixing agreement illegal is nothing less than a return to the notion, rejected since the decision in *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927), that the level of agreed-upon prices is relevant to the legality of the agreement. It is all but a truism of antitrust that an agreement upon price is illegal without regard to whether the defendants believed the resulting price was reasonable. *See, e.g., Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717, 720, 724 (1988); *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960); *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707

(1944); *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911).

The best illustration of the error of the court's section 1 conspiracy analysis is this Court's decision in *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328 (1990). In that case, the Court addressed a vertical maximum price-fixing agreement and reaffirmed the fundamental principle that agreements between independent parties on price, whether they are vertical or horizontal, and whether the agreement is to set higher *or* lower prices, are *per se* violations of section 1. *Id.* at 335-336 (*citing Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968)). The major holding of the case was that competitors ordinarily suffered no "anti-trust injury" from vertical maximum price agreements — *except* in the case of predatory pricing. *Id.* at 339-340. Under *Atlantic Richfield*, it is plain both that the agreement on price between Rule and Tie Down was illegal, and that U.S. Anchor can maintain a section 1 claim for this violation.

Finally, petitioner must point out that the court of appeals' conclusion was manifestly insupportable even on its own terms. U.S. Anchor submitted substantial evidence — not addressed by the court of appeals — which demonstrated that the Rule selling prices Tie Down proposed in the MacKarvich memo were themselves *below* the selling price *plus* associated charges that Tie Down charged Rule. Tie Down charged $.055 per pound in "handling charges" and $.11 per anchor for labeling. If these charges are added to the Tie Down selling price, it is evident that the Rule selling price proposed in the MacKarvich memo for seven of the twelve anchors is below the amount Tie Down was charging for those anchors in the first place. As to two of the anchors, the proposed Rule selling price was below Tie Down's price to Rule even without the handling and labeling charges. Of course, after paying the full cost of the anchors, Rule would also incur marketing and distribution costs. The relevant figures from the trial evidence as summarized in

U.S. Anchor's petition for rehearing to the Eleventh Circuit are reproduced at Pet. App. 107a. In its rush to reverse the jury's verdict, the Eleventh Circuit simply ignored irrefutable evidence that Tie Down *did* know it was proposing a predatory price agreement.

In all candor, the flaws in the court of appeals' analysis of the conspiracy counts are so evident, and the legal principles so well established, that they do not merit plenary review by the Court. This Court should, however, correct the Eleventh Circuit's fundamental error in conjunction with its review of the important attempted monopolization issue set forth above. Alternatively, the Court should consider summary reversal. Cf. *Palmer* v. *BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (summarily reversing Eleventh Circuit's erroneous imposition of a heightened "explicit agreement" requirement on section 1 price fixing allegations). At a minimum, the Court should call for the views of the Solicitor General on this issue. In *Palmer*, the Court had the benefit of the views of the United States concerning the effects of the decision below on its civil and criminal enforcement efforts prior to summarily reversing. This information might prove equally valuable to the Court here.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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